

# CONFERENCE COMMITTEE REPORT FORM

Austin, Texas

5-28-05

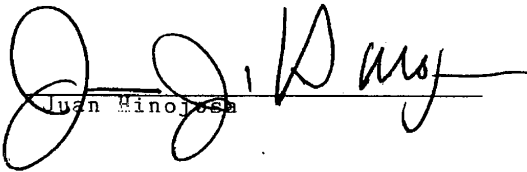
Date

Honorable David Dewhurst  
President of the Senate

Honorable Tom Craddick  
Speaker of the House of Representatives

Sirs:

We, Your Conference Committee, appointed to adjust the differences between the Senate and the House of Representatives on House Bill 268 have had the same under consideration, and beg to report it back with the recommendation that it do pass in the form and text hereto attached.

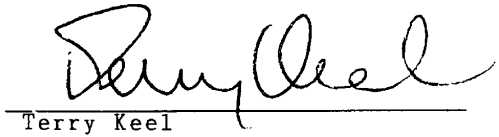
  
Juan Rinojosa

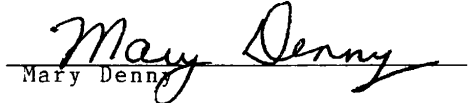
Robert Duncan

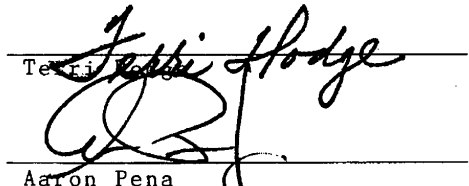
Rodney Ellis

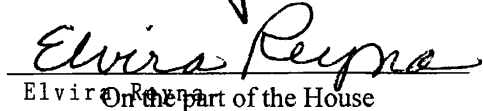
Chris Harris

Kel Seliger  
On the part of the Senate

  
Terry Keel

  
Mary Denny

  
Aaron Pena

  
Elvira Reyna  
On the part of the House

## Note to Conference Committee Clerk:

Please type the names of the members of the Conference Committee under the lines provided for signature. Those members desiring to sign the report should sign each of the six copies. Attach a copy of the Conference Committee Report and a Section by Section side by side comparison to each of the six reporting forms. The original and two copies are filed in house of origin of the bill, and three copies in the other house.

# CONFERENCE COMMITTEE REPORT

3<sup>rd</sup> Printing

H.B. No. 268

A BILL TO BE ENTITLED

AN ACT

relating to the qualifications and appointment of counsel for indigent defendants in capital cases.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 2, Article 11.071, Code of Criminal Procedure, is amended by amending Subsections (c) and (d) and adding Subsection (d-1) to read as follows:

(c) At the earliest practical time, but in no event later than 30 days, after the convicting court makes the findings required under Subsections (a) and (b), the convicting court shall appoint competent counsel from the list of qualified attorneys maintained by the Task Force on Indigent Defense under Subsection (d)(3), unless the applicant elects to proceed pro se or is represented by retained counsel. The convicting court may also appoint an attorney to assist an attorney appointed as lead counsel in the case. The assisting attorney is not subject to the guidelines applicable to an attorney appointed as lead counsel. On appointing counsel under this section, the convicting court shall immediately notify the court of criminal appeals of the appointment, including in the notice a copy of the judgment and the name, address, and telephone number of the appointed counsel.

(d)(1) The Task Force on Indigent Defense may ~~court of criminal appeals shall~~ adopt guidelines ~~rules~~ for the appointment of attorneys as counsel under this section and may

1 consider the guidelines in determining whether an attorney is  
2 qualified for an appointment ~~[the convicting court may appoint an~~  
3 ~~attorney as counsel under this section only if the appointment is~~  
4 ~~approved by the court of criminal appeals in any manner provided by~~  
5 ~~those rules]~~. The Task Force on Indigent Defense shall determine  
6 whether an attorney is qualified for an appointment on a  
7 case-by-case basis.

8 (2) The guidelines may include that an attorney  
9 appointed as lead counsel under this section:

10 (A) be a member of the State Bar of Texas;

11 (B) exhibit proficiency and commitment to  
12 providing quality representation to defendants in death penalty  
13 cases;

14 (C) have participated in continuing legal  
15 education courses or other training relating to criminal defense in  
16 death penalty cases;

17 (D) have at least five years of experience in  
18 criminal trial or appellate litigation or habeas corpus practice;  
19 and

20 (E) have participated in the preparation of  
21 appellate briefs for the prosecution or defense, or in the drafting  
22 of appellate opinions as an attorney for an appellate court, in  
23 felony cases, including homicide cases and other cases involving an  
24 offense punishable as a capital felony or a felony of the first or  
25 second degree.

26 (3) The Task Force on Indigent Defense shall maintain  
27 a list of attorneys qualified for appointment under this section

1 and make that list available to a convicting court for the purpose  
2 of assisting that court with the appointment of qualified counsel  
3 under this section. .

4 (4) The convicting court may not appoint an attorney  
5 as counsel under this section if the attorney:

6 (A) has been found by a federal or state court to  
7 have rendered ineffective assistance of counsel during the trial or  
8 appeal of any capital case; or

9 (B) represented the applicant at trial or on  
10 direct appeal, unless:

11 (i) the applicant and the attorney request  
12 the appointment on the record; and

13 (ii) the court finds good cause to make the  
14 appointment.

15 (d-1) The court of criminal appeals may annually review the  
16 list of attorneys qualified for appointment under this section to  
17 ensure that the attorneys included on the list are suitably  
18 qualified and proficient to be eligible for appointment. The court  
19 may determine whether an attorney is eligible for appointment on a  
20 case-by-case basis. The court may remove an attorney from the list  
21 if the attorney is determined to be ineligible for appointment.

22 SECTION 2. Article 26.052(d), Code of Criminal Procedure,  
23 is amended to read as follows:

24 (d)(1) The committee shall adopt standards for the  
25 qualification of attorneys to be appointed to represent indigent  
26 defendants in capital cases in which the death penalty is sought.

27 (2) The standards must require that a trial ~~and~~

1 attorney appointed as lead counsel to a death penalty case:

2 (A) be a member of the State Bar of Texas;

3 (B) exhibit proficiency and commitment, to  
4 providing quality representation to defendants in death penalty  
5 cases;

6 (C) have participated in continuing legal  
7 education courses or other training related to criminal defense in  
8 death penalty cases;

9 (D) have not been found by a federal or state  
10 court to have rendered ineffective assistance of counsel during the  
11 trial or appeal of any capital case;

12 (E) have at least five years of experience in  
13 criminal trial or appellate litigation;

14 (F) ~~[(D)]~~ have tried felony cases to a verdict as  
15 lead prosecutor or lead defense counsel ~~[a significant number of~~  
16 ~~felony cases]~~, including homicide trials and other trials for  
17 offenses punishable as second or first degree felonies or capital  
18 felonies; and

19 (G) ~~[(E)]~~ have previous ~~[trial]~~ experience as a  
20 member of the prosecution or defense trial counsel team in:

21 (i) jury selection in a capital case in  
22 which the death penalty is sought;

23 (ii) the direct examination or  
24 cross-examination ~~[use]~~ of ~~[and challenges to]~~ mental health or  
25 forensic expert witnesses; and

26 (iii) the presentation or  
27 cross-examination of ~~[(ii) investigating and presenting]~~

mitigating evidence at the penalty phase of a homicide [~~death~~  
~~penalty~~] trial[, ~~and~~

~~[(F) have participated in continuing legal~~  
~~education courses or other training relating to criminal defense in~~  
~~death penalty cases].~~

(3) The standards must require that an attorney  
appointed as lead appellate counsel in the direct appeal of a death  
penalty case:

(A) be a member of the State Bar of Texas;

(B) exhibit proficiency and commitment to  
providing quality representation to defendants in death penalty  
cases;

(C) have participated in continuing legal  
education courses or other training related to criminal defense in  
death penalty cases;

(D) have not been found by a federal or state  
court to have rendered ineffective assistance of counsel during the  
trial or appeal of any capital case;

(E) have at least five years of experience in  
criminal trial or appellate litigation; and

(F) have participated in the preparation of  
appellate briefs for the prosecution or defense, or in the drafting  
of appellate opinions as an attorney for an appellate court, in  
felony cases, including homicide cases and other cases involving an  
offense punishable as a capital felony or a felony of the first or  
second degree.

(4) The committee shall prominently post the standards

1 in each district clerk's office in the region with a list of  
2 attorneys qualified for appointment.

3       (5) [~~4~~] Not later than the second anniversary of the  
4 date an attorney is placed on the list of attorneys qualified for  
5 appointment in death penalty cases and each year following the  
6 second anniversary, the attorney must present proof to the  
7 committee that the attorney has successfully completed the minimum  
8 continuing legal education requirements of the State Bar of Texas,  
9 including a course or other form of training relating to the defense  
10 of death penalty cases. The committee shall remove the attorney's  
11 name from the list of qualified attorneys if the attorney fails to  
12 provide the committee with proof of completion of the continuing  
13 legal education requirements.

14       SECTION 3. The Task Force on Indigent Defense shall prepare  
15 the list of qualified attorneys required by Section 2(d), Article  
16 11.071, Code of Criminal Procedure, as amended by this Act, not  
17 later than March 1, 2006.

18       SECTION 4. A convicting court that appoints counsel under  
19 Section 2, Article 11.071, Code of Criminal Procedure, on or after  
20 May 1, 2006, shall appoint the counsel in conformity with this Act.  
21 Counsel appointed under Section 2, Article 11.071, Code of Criminal  
22 Procedure, before May 1, 2006, must be appointed in conformity with  
23 Section 2, Article 11.071, Code of Criminal Procedure, as that  
24 section existed immediately before that date, and the former law is  
25 continued in effect for that purpose.

26       SECTION 5. A local selection committee shall amend  
27 standards previously adopted by the committee to conform with the

1 requirements of Article 26.052(d), Code of Criminal Procedure, as  
2 amended by this Act, not later than the 75th day after the effective  
3 date of this Act. An attorney appointed to a death penalty case on  
4 or after the 75th day after the effective date of this Act must meet  
5 the standards adopted in conformity with amended Article 26.052(d).  
6 An attorney appointed to a death penalty case before the 75th day  
7 after the effective date of this Act is covered by the law in effect  
8 when the attorney was appointed, and the former law is continued in  
9 effect for that purpose.

10 SECTION 6. This Act takes effect immediately if it receives  
11 a vote of two-thirds of all the members elected to each house, as  
12 provided by Section 39, Article III, Texas Constitution. If this  
13 Act does not receive the vote necessary for immediate effect, this  
14 Act takes effect September 1, 2005.



**House Bill 268**  
Conference Committee Report  
Section-by-Section Analysis

HOUSE VERSION

SECTION 1. Amends Sections 2(c) and (d), and adds (d-1), Article 11.071, Code of Criminal Procedure, relating to procedure for a writ of habeas corpus in a death penalty case, as follows:

(c) Requires the convicting court to appoint competent counsel *that meets the requirements of Subsection (d)(2)*. Allows the court to appoint an assisting attorney who is *required to meet the requirements of Subsections (d)(2)(A)-(D) but is not required to meet the requirements of Subsection (d)(2)(E) or (F)*.

(d) Requires the Task Force on Indigent Defense to adopt standards for the appointment of attorneys as counsel under this section. Sets out items the *standards must require* for appointment of an attorney as lead counsel, including that *an attorney must not have been found to have rendered ineffective assistance of counsel during any criminal case* and must have participated in the preparation of appellate briefs for the prosecution or defense, or in the drafting of appellate opinions as a *staff* attorney for an appellate court, in felony cases.

(d-1) Adds provisions relating to an annual review of a certain list of qualified attorneys.

SECTION 2. Amends Article 26.052(d), Code of Criminal Procedure, relating to appointment of counsel for a death

SENATE VERSION

SECTION 1. Same as House version, except as follows:

(c) Same as House version, except requires the court to appoint counsel *from the list of qualified attorneys maintained by the Task Force on Indigent Defense under Subsection (d)(3)* and provides that an assisting attorney is *not subject to the guidelines applicable to an attorney appointed as lead counsel under Subsection (d)(2)(E) or (F)*. (CA1)

(d) Same as House version, except allows, rather than requires, the task force to adopt *discretionary guidelines*, authorizes the task force to consider the guidelines in determining whether an attorney is qualified for an appointment, expressly prohibits the task force from adopting mandatory standards for appointment, and requires the task force to determine an attorney's qualifications on a case-by-case basis. Sets out items the *discretionary standards may include*, and replaces *criminal* with *capital*. (CA1)

(d-1) Same as House version.

SECTION 2. Same as House version, except refers to *capital* cases rather than *criminal* cases and to a *homicide*

CONFERENCE

SECTION 1. Same as Senate version.

(c) Same as Senate version, except deletes *under Subsection (d)(2)(E) or (F)*.

(d) Same as Senate version, except deletes *discretionary* in each place it appears, deletes *staff*, and deletes the express prohibition on adopting mandatory standards for appointment. Deletes the item in the guidelines relating to a finding of ineffective assistance and prohibits the convicting court from appointing an attorney to represent the applicant at trial or on direct appeal if the attorney has been found to have rendered ineffective assistance of counsel during a capital case.

(d-1) Same as Senate version.

SECTION 2. Same as House version, except refers to *capital* cases rather than *criminal* and deletes *staff*.

**House Bill 268**  
Conference Committee Report  
Section-by-Section Analysis

HOUSE VERSION

penalty case, to add certain requirements to the standards for appointment as lead counsel. Among other provisions, the standards must require that the attorney must not have been found to have rendered ineffective assistance of counsel during any *criminal* case and must have previous experience in certain capacities at the presentation or cross-examination of mitigating evidence at the penalty phase of a *homicide trial*. Relating to the requirement that an attorney must have tried felony cases, deletes a provision that required the attorney to have tried *a significant number of felony cases*. Adds standards requirements for appointment as lead appellate counsel, including requirements that an attorney must not have been found to have rendered ineffective assistance of counsel during any *criminal* case and must have participated in the preparation of appellate briefs for the prosecution or defense, or in the drafting of appellate opinions as a *staff* attorney for an appellate court, in felony cases, including *homicide cases and other cases involving an offense punishable as a capital felony or a felony of the first or second degree*.

SECTION 3. Amends Section 71.060(c), Government Code, to provide that any qualification standards adopted by the task force under Subsection (a) that relate to the appointment of counsel in a death penalty case must be consistent with the standards specified under Section 2, Article 11.071, or Article 26.052(d), Code of Criminal Procedure, as appropriate.

SENATE VERSION

*trial* rather than a *death penalty trial*, and retains the stipulation that a certain attorney must have tried a *significant number of felony cases*. Provides that an attorney must have participated in the preparation of certain appellate matters in felony cases, *including at least one capital felony case*. (CA1) (CA2)

No equivalent provision. (CA1)

CONFERENCE

Same as Senate version.

**House Bill 268**  
**Conference Committee Report**  
**Section-by-Section Analysis**

**HOUSE VERSION**

SECTION 4. Requires the task force to adopt standards described by Section 2(d), Article 11.071, Code of Criminal Procedure, as amended by this Act, not later than January 1, 2006. Requires the task force to prepare the list of qualified attorneys required by that section not later than March 1, 2006.

SECTION 5. Saving provision.

SECTION 6. Sets out a deadline for the amendment of a local selection committee's standards and includes a saving provision for appointments under those standards.

SECTION 7. Effective date.

**SENATE VERSION**

SECTION 3. Substantially the same as Section 4 of the House version, except omits the provision relating to the task force adopting standards. (CA1)

SECTION 4. Same as Section 5 of the House version.

SECTION 5. Same as Section 6 of the House version.

SECTION 6. Same as Section 7 of the House version.

**CONFERENCE**

SECTION 3. Same as Senate version.

SECTION 4. Same as Section 5 of the House version.

SECTION 5. Same as Section 6 of the House version.

SECTION 6. Same as Section 7 of the House version.